

MICHIGAN SUPREME COURT



Office of Public Information

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NO-FAULT, CRIMINAL SENTENCING ISSUES TO BE HEARD BY MICHIGAN SUPREME COURT IN ORAL ARGUMENT NEXT WEEK

LANSING, MI, April 6, 2005 – In oral arguments next week, the Michigan Supreme Court will be asked to overrule a 1986 decision that controls deadlines for no-fault benefits claims.

In *Devillers v Auto Club Insurance Association*, the plaintiff asserts that the defendant insurance company owes her payment for services she performed for her teenage son, who was seriously injured in an auto accident. Under Michigan's no-fault law, if the insurance company has paid personal protection benefits, but later discontinues them, a lawsuit may be started within one year after the claimant's most recent allowable expense, work loss, or survivor's loss. In *Devillers*, the plaintiff filed suit on November 2, 2002 – more than a year after the insurance company stopped paying benefits. But the plaintiff argues, based on the Court's decision in *Lewis v DAIIE*, 426 Mich 93 (1986), that the one-year period was suspended for over 19 months, the period between the time that the insurance company ended benefits to the time it sent the plaintiff a letter memorializing the benefits cut-off. The *Lewis* Court held that the one-year limit may be tolled from the date a claimant makes a specific request for benefits to the date the insurance company formally denies that claim. The defendant insurance company asks the Court to overrule *Lewis* and dismiss some of the plaintiff's claims.

The Court will also hear *People v Hendrick*, at issue is whether statutory sentencing guidelines apply to sentences imposed after a probation violation. After pleading guilty to home invasion, the defendant was sentenced to five years' probation; he pled guilty to possessing a Molotov cocktail a year later and was again sentenced to five years' probation, with the first year in jail. When the defendant was found to have violated his probation, the trial court sentenced him to prison terms for both of his earlier offenses. The Court of Appeals reversed, stating that the sentencing guidelines apply to sentences imposed after the offender violates probation. Because the Molotov cocktail sentence of 10 to 20 years exceeded the guidelines, the appellate court said, the defendant must be re-sentenced.

Also before the Court are 12 other cases, involving criminal, property, trust, sexual harassment, defamation, personal injury, civil rights, false imprisonment, and administrative law issues.

Court will be held on **April 12, 13, and 14**. Court will convene at **9:30 a.m.** each day. Oral arguments will be heard in the Supreme Court courtroom on the sixth floor of the Michigan Hall of Justice, located at 925 W. Ottawa in Lansing.

(Please note: The summaries that follow are brief accounts of complicated cases and may not reflect the way in which some or all of the Court's seven Justices view the cases. The attorneys may also disagree about the facts, the issues, the procedural history, or the significance of their cases. Briefs in the cases are available on the Supreme Court's website at http://courts.michigan.gov/supremecourt/Clerk/msc_orals.htm. For further details about the cases, please contact the attorneys.)

Tuesday, April 12, 2005
Morning Session

PEOPLE v CURVAN (case no. 126538)

Prosecuting attorney: Thomas M. Chambers/(313) 224-5749

Attorney for defendant Mario Curvan: Marla R. McCowan/(313) 256-9833

Trial court: Wayne County Circuit Court

At issue: Can the defendant be convicted of both first-degree felony murder and the underlying felony of armed robbery?

Background: On December 31, 1998, customers discovered the body of Frank Bono inside his laundromat. He had died from blunt force trauma to the head. The murder remained unsolved for over three years. Eventually, a unit organized to reinvestigate old homicide cases received a tip that Mario Curvan might have some information regarding Bono's murder. After being questioned by the police, Curvan admitted that he had accompanied Abdullah Halim to the laundromat with the intent to rob Bono. Halim took Curvan's hammer along with him. After Bono let the two into his establishment, Halim struck Bono's head with the hammer and then stabbed Bono in the neck. Halim took some money and gave Curvan \$15 or \$20. Curvan was charged with first-degree felony murder, MCL 750.316, and armed robbery, MCL 750.529. On March 19, 2002, after a three-day jury trial, Curvan was found guilty of both charges. He was sentenced on April 11, 2002 to life for the first-degree felony murder conviction and 20 to 40 years in prison for the armed robbery conviction. Curvan appealed, claiming that his sentences for both felony murder and the underlying felony of armed robbery violated his constitutional right to be free from double jeopardy. The Court of Appeals agreed that the dual sentences violated the Double Jeopardy Clauses of the U.S. and Michigan Constitutions. The prosecutor appeals.

DETROIT EDISON COMPANY, et al. v MICHIGAN PUBLIC SERVICE COMMISSION, et al. (case nos. 125950, 125954, 125955)

Attorney for appellant Detroit Edison Company: Stephen J. Rhodes/(517) 371-8100

Attorney for appellant Michigan Electric Cooperative Association: Christine Mason Soneral/(517) 374-9184

Attorney for appellant Consumers Energy Company: Jon R. Robinson/(517) 788-0698

Attorney for appellee Michigan Public Service Commission: Steven D. Hughey/(517) 241-6680

Attorney for appellee Michigan Alliance for Fair Competition: Haran C. Rashes/(517) 318-3100

Lower tribunal: Michigan Public Service Commission

At issue: The appellants challenge the Michigan Public Service Commission's (MPSC) Code of Conduct implementing the Customer Choice and Electricity Reliability Act (Act 141), which

encourages competition in the electricity market. Was the Code of Conduct issued in violation of the Administrative Procedures Act (APA) rulemaking procedures?

Background: The MPSC was legislatively vested with the jurisdiction to regulate public utilities by way of the Public Service Commission Act (Act 3) in 1939. The MPSC's first effort to use its authority to establish a more competitive framework for electric suppliers was struck down as being beyond its powers and jurisdiction in *Consumers Power Co v Public Service Comm*, 460 Mich 148 (1999). In 2000, the Legislature enacted the Customer Choice and Electricity Reliability Act, also known as Act 141, which expanded the existing powers of the MPSC and required the MPSC to establish a Code of Conduct, MCL 460.10a(4). The MPSC developed the required Code of Conduct by issuing orders in a pending contested case. The appellants, Detroit Edison, Consumers Energy, and Michigan Electric Cooperative, contend that the MPSC's orders are unlawful because the MPSC failed to comply with rulemaking provisions of Michigan's Administrative Procedures Act when implementing the Code of Conduct. The Court of Appeals found that the MPSC's implementation of the Code of Conduct fell within the scope of MCL 24.207(f), which provides an exception to the APA rulemaking requirements for "a determination, decision, or order in a contested case." The appellants appeal.

PEOPLE v HOUSTON (case no. 126025)

Prosecuting attorney: Donald A. Kuebler/(810) 257-3854

Attorney for defendant Duane Joshua Houston: Gail Rodwan/(313) 256-9833

Attorney for amicus curiae Prosecuting Attorneys Association of Michigan: Danielle Walton/(248) 858-0656

Trial court: Genesee County Circuit Court

At issue: This second-degree murder case presents two sentencing issues. First, should Offense Variable (OV) 3 (physical injury to victim) be scored 25 points when the victim dies? Second, if OV 3 was improperly scored, does the II-B cell of the M2 grid allow for the imposition of a life sentence, or is a life sentence a departure from the sentencing guidelines?

Background: This case involves the shooting death of John Strong on February 22, 2001 in Flint. A witness testified that Duane Houston shot Strong; Houston was questioned by the police and then charged with first-degree felony murder, felony-firearm, and assault with intent to rob while armed. Houston's alibi defense was rejected by the jury, which convicted him of second-degree murder and felony-firearm while acquitting him of the other charges. Houston was sentenced to life for the murder conviction, consecutive to the mandatory two years for felony-firearm. He raised two sentencing issues in the Court of Appeals, arguing that OV 3 (physical injury to the victim) was improperly scored, and that his life sentence was a departure from the sentencing guidelines. The Court of Appeals affirmed Houston's convictions and sentences in a published opinion dated April 1, 2004. Houston appeals.

Afternoon Session

PEOPLE v HENDRICK (case no. 126371)

Prosecuting attorney: Carolyn M. Breen/(313) 224-5834

Attorney for defendant Darin Hendrick: Marla R. McCowan/(313) 256-9833

Trial court: Wayne County Circuit Court

At issue: Do the sentencing guidelines apply to sentences imposed after a probation violation? If so, can a trial court find that the conduct giving rise to the probation violation constitutes a substantial and compelling reason to depart from the sentencing guidelines?

Background: In March 2000, Darin Hendrick pleaded guilty to attempted first-degree home invasion. He was later sentenced to five years of probation, with the first year in jail. In April 2001, Hendrick pleaded guilty to possessing a Molotov cocktail, and he was sentenced to five years of probation with the first year in jail. In August 2001, Hendrick was found to have violated his probation by being in possession of a shotgun while on a public street. On August 23, 2001, Hendrick was sentenced to prison terms for both of the offenses for which he had been put on probation: one to five years for the home invasion conviction, and 10 to 20 years for the Molotov cocktail conviction. The Court of Appeals denied Hendrick's request to review both these sentences, but the Supreme Court remanded this case to the Court of Appeals as on leave granted for consideration of whether the legislative sentencing guidelines apply to sentences imposed after a probation violation. On remand, the Court of Appeals decided in a published opinion that the legislative guidelines do apply to sentences imposed after a probation violation. Because Hendrick's Molotov cocktail sentence exceeded the guidelines, the Court of Appeals vacated that sentence and remanded for resentencing. The prosecutor appeals.

DEVILLERS v AUTO CLUB INSURANCE ASSOCIATION (case no. 126899)

Attorney for plaintiff Eva Devillers, as Guardian and Conservator of Michael J. Devillers: Harold A. Perakis/(586) 778-7778

Attorney for defendant Auto Club Insurance Association: James G. Gross/(313) 963-8200

Attorney for amicus curiae Insurance Institute of Michigan: Mary Massaron Ross/(313) 983-4801

Attorneys for amicus curiae Coalition Protecting Auto No-Fault: Steven A. Hicks, George T. Sinas/(517) 394-7500

Trial court: Oakland County Circuit Court

At issue: This case concerns the No-Fault Act and MCL 500.3145(1), the one-year-back rule, which imposes deadlines on a person who intends to file a claim for personal protection insurance benefits. Under Michigan's no-fault law, if the insurance company has paid personal protection benefits, but later discontinues them, a lawsuit may be started within one year after the claimant's most recent allowable expense, work loss, or survivor's loss. In *Lewis v DAIIE*, 426 Mich 93 (1986), the Michigan Supreme Court held that the one-year period is tolled from the date the claimant makes a specific request for benefits to the date the insurer formally denies that claim. Should the Court overrule *Lewis v DAIIE*? If it does, should the Court's decision be given prospective effect only?

Background: Michael Devillers, then a teenager, was seriously injured in an automobile accident on September 30, 2000. After being hospitalized for about 20 days, he was discharged to his home. Because he was unable to get around without help, his mother, Eva Devillers, cared for him. For the period from October 20, 2000 to February 14, 2001, Auto Club Insurance Association (ACIA) paid Eva Devillers approximately \$21,000 for her care of Michael. On February 15, 2001, ACIA stopped paying benefits. In a letter dated October 7, 2002, an ACIA claims adjuster wrote to Eva Devillers, stating that ACIA had discontinued benefits based on a doctor's representation that Michael was clear to function without supervision. Eva Devillers filed this lawsuit on November 2, 2002, seeking money for services she had allegedly rendered to Michael without pay. ACIA responded that the claim is limited by the one-year-back rule of

MCL 500.3145(1); ACIA asked the court to dismiss some of Devillers' claims on that basis. Devillers responded that, under *Lewis v DAIE*, the time that elapsed between the date that ACIA stopped paying benefits (February 15, 2001) and the date of ACIA's letter memorializing the benefits cut-off (October 7, 2002) should not count toward the one-year period. The trial court denied ACIA's motion and scheduled this case for trial. ACIA then filed an emergency appeal in the Court of Appeals, which was denied. The Supreme Court then issued orders that stayed the trial and decided to hear ACIA's appeal.

Wednesday, April 13, 2005

Morning Session

PEOPLE v STARKS (case no. 126756)

Prosecuting attorney: Joseph A. Puleo/(313) 224-5748

Attorney for defendant Kimberly Starks: Arlene F. Woods/(313) 961-0192

Trial courts: Wayne County Circuit Court and 36th District Court

At issue: The defendant allegedly offered to perform fellatio on a minor, and instructed the minor to pull down his pants. Is this evidence sufficient to bind over the defendant on the charge of assault with intent to commit criminal sexual conduct ("CSC") involving penetration, MCL 750.520g(1)?

Background: The incident giving rise to defendant Kimberly Starks' arrest occurred at the Herman Keifer Hospital on June 30, 2001. Starks was a child care worker for a program for delinquent boys. She is alleged to have instructed a 13-year-old male resident, Jonathan Jones, to pull down his pants so that she could perform fellatio on him. At a preliminary examination, a coworker testified about finding Starks in the facility's laundry room with Jones standing behind her. Jones' belt was unbuckled and his pants were unbuttoned. His zipper was open, and he was holding up his pants. At the same hearing, Jones testified that Starks offered to perform fellatio. He testified that she instructed him to pull down his pants, and that he complied. Jones explained that they were then interrupted by Starks' coworker. After hearing this testimony, the 36th District Court refused to bind over Starks, finding that there was no evidence that Jones was placed in fear and that, as a result, he was not assaulted. The Court of Appeals affirmed the lower court's ruling after considering *People v Worrell*, 417 Mich 617 (1983), in which a majority of the Supreme Court held that a charge of assault with intent to commit CSC involving penetration is inappropriate if there is no evidence that the complainant was threatened, placed in apprehension of injury or harm, or was complying with the defendant's directives unwillingly. The Court of Appeals did urge the Supreme Court to reexamine *Worrell*. The prosecutor appeals.

CITY OF NOVI v ADELL CHILDREN'S FUNDED TRUST, et al. (case no. 122985)

Attorney for plaintiff City of Novi: Thomas R. Schultz/(248) 851-9500

Attorney for defendants Robert Adell Children's Funded Trust, Franklin Adell Children's Funded Trust, and Marvin Adell Children's Funded Trust: H. Adam Cohen/(248) 356-5888

Trial court: Oakland County Circuit Court

At issue: The City of Novi filed a condemnation action to obtain property from the defendants to build a road. The defendants argue that the road would primarily benefit private corporations rather than the public. Is the taking of property constitutional?

Background: In August 1998, the Novi City Council passed resolutions declaring the necessity and taking of the defendants' property for the purpose of creating a road that would benefit, among others, Wisne Corporation. The City of Novi filed a condemnation complaint in September 1998, pursuant to the Uniform Condemnation Procedures Act, MCL 213.51 et seq. The defendants, the Adell Children's Funded Trusts, filed a motion challenging the public purpose and necessity of the taking, pursuant to MCL 213.56. They claimed that the taking was for the private purpose of benefiting Wisne, pointing out Wisne's financial support for the road and documents referring to the benefit Wisne would receive from the road. Following a three-day hearing, the trial court concluded that the proposed taking was unconstitutional. The court found that the proposed road primarily benefited Wisne, and that this benefit predominated over the benefit to the general public. The Court of Appeals affirmed the trial court's ruling. The City of Novi appeals.

TRAXLER, et al. v ROTHBART (case no. 125948)

Attorney for plaintiffs Barbara Sue Traxler and Norma Jean Castle, Successor Co-Trustees of the Norman John Sinclair Trust: Ray M. Toma/(248) 594-4544

Attorney for defendant Shire Rothbart: Christopher S. Olson/(248) 414-9900

Attorneys for amicus curiae Council of the State Bar of Michigan's Probate and Estate Planning Section: John J. Bursch, John H. Martin, Mark K. Harder/(616) 752-2000

Trial court: Oakland County Circuit Court

At issue: The defendant entered into a land sale contract with one of two trustees. The trustee, however, could not enter into the contract without the other trustee's approval. The trustee now wants to be released from the contract so that she and her co-trustee can accept a better offer. Can the defendant enforce the contract? Does MCL 700.7404, which protects third parties who interact with trustees who exceed their authority, apply here?

Background: The plaintiffs are sisters and co-trustees of their father's trust. The trust document provides that the consent of both co-trustees is necessary to effectuate a transfer of trust property, unless one of the trustees is unwilling or unable to act. The main item of trust property was the father's home. One of the plaintiffs, Barbara Sue Traxler, acted as her father's sole guardian during his final illness. Traxler accepted Shire Rothbart's offer on the home, and she and Rothbart signed a land sale contract. When Traxler told her sister, Norma Jean Castle, about the offer and acceptance, Castle stated that she did not want to sell. After Traxler and Castle received a better offer on the property, they sought a release from Rothbart, who refused. Traxler and Castle then sued Rothbart. Both the trial court and the Court of Appeals held that Rothbart did not have a right to enforce the purchase agreement. Both courts concluded that MCL 700.7404, which protects third parties dealing with trustees, did not apply to this situation. Rothbart appeals.

Afternoon Session

McCLEMENTS v FORD MOTOR COMPANY (case no. 126276)

Attorney for plaintiff Milissa McClements: George B. Washington/(313) 963-1921

Attorney for defendant Ford Motor Company: Julia Turner Baumhart/(248) 645-0000

Trial court: Oakland County Circuit Court

At issue: The plaintiff was employed by a company that operated the cafeterias at a Ford Motor Company plant. She alleges that a Ford supervisor sexually harassed her. Does she have a cause

of action for negligent retention? Can she assert a sexual harassment claim against Ford even though Ford is not her employer?

Background: Milissa McClements was employed by AVI, a contractor that operated the cafeterias at Ford Motor Company's Wixom assembly plant. In March 1998, McClements began working as a cashier in one of the cafeterias. McClements alleges that Daniel Bennett, a supervisor at the plant, sexually harassed her. On September 4, 2001, McClements filed a lawsuit, in which she claimed that Ford and Bennett violated the Michigan Civil Rights Act by creating a sexually hostile work environment. She also asserted that Ford was negligent because it retained Bennett as an employee. The trial court granted Ford's motion for summary disposition, dismissing Ford from the case. The court held that Ford could not be liable under the Civil Rights Act because McClements was not a Ford employee. The court also found that Ford was not negligent in retaining Bennett, because Ford did not know that Bennett had a propensity to act improperly in the workplace or posed a danger to others. Even if Ford had such notice, the court stated, there was no authority to support McClements' assertion that this notice could support a claim of negligent retention. The Court of Appeals affirmed the trial court's ruling on McClements' Civil Rights Act claim, but reversed the trial court's dismissal of the negligent retention claim, finding that McClements had presented sufficient evidence to reach a jury. Both parties appeal.

PEOPLE v SESSIONS (case no. 126514)

Prosecuting attorney: William J. Vaillencourt, Jr./ (517) 546-1850

Attorney for defendant Mark David Sessions: James D.A. Buttrey/ (517) 546-6585

Attorney for amicus curiae Jackson County Prosecuting Attorney: Jerrold Schrottenboer/ (517) 788-4283

Trial courts: Livingston County Circuit Court and 53rd District Court

At issue: A convicted felon sentenced to probation may not possess a firearm until a certain number of years after he "has successfully completed all conditions of probation..." Does this statute bar a felon who has violated probation for any reason from ever possessing a firearm, even if the felon was discharged from probation?

Background: In 1993, defendant Mark Sessions pled guilty to three charges of breaking and entering. He was sentenced to three years of probation. One condition of probation was that Sessions not violate any laws. In 1995, Sessions pled guilty to violating this term of his probation, but the court continued his probation. He was discharged from probation on April 23, 1996, as originally scheduled. The probation officer who prepared the petition for discharge wrote that Sessions had complied with the terms and conditions of his probation, and the circuit court judge signed an order confirming that Sessions was discharged from probation. On February 9, 2003, while responding to a domestic-violence complaint from Sessions' wife, police observed that Sessions owned a single-shot shotgun. Sessions was charged with one count of domestic violence, MCL 750.81(2), and one count of being a felon in possession of a firearm, MCL 750.224f. Generally, under MCL 750.224f, a person convicted of a felony and sentenced to probation may not possess or use a firearm until three years after the term of probation expires. Sessions moved to dismiss the firearm charge on the ground that he had been discharged from probation more than three years before February 9, 2003. The prosecutor argued that Sessions did not satisfy MCL 750.224f's requirement that a defendant have "successfully completed all conditions" of probation, since Sessions had violated one of the terms of his probation before he was discharged. The district court did not agree with the

prosecutor's argument, and dismissed the firearm charge. The circuit court affirmed the district court's ruling. In a published opinion, the Court of Appeals reversed the lower courts, and remanded for further proceedings. Sessions seeks leave to appeal to the Supreme Court.

MITAN v CAMPBELL (case no. 126451)

Attorney for plaintiff Kenneth Mitan: Keith J. Mitan/(248) 352-6070

Attorney for defendant Maura Campbell: Patrick J. O'Brien/(517) 373-6434

Trial court: Ingham County Circuit Court

At issue: Defendant Maura Campbell discussed plaintiff Kenneth Mitan during an interview with a reporter; the interview was broadcast three days later. Mitan filed a defamation action within a year of the broadcast, but more than a year after the interview. Is this claim barred by the one-year statute of limitations?

Background: Maura Campbell, the Public Relations Director for the Department of Consumer and Industry Services (CIS), was interviewed by a television reporter for WXYZ-TV on February 22, 2000. The interview concerned wage and hour claims being made by Kenneth Mitan's employees. Campbell made the following statement about Mitan during the interview: "Unfortunately, we've got a guy who has figured out all the loopholes, all the ways that he can appeal, all the ways that he can stay off having to pay his penalties. He's just a bad egg." The interview was broadcast on February 25, 2000, and Mitan sued for defamation on February 26, 2001. Campbell filed a motion to dismiss, arguing that defamation actions must be brought within one year, and that Mitan's action was filed more than one year after the interview occurred. The trial court granted the motion, holding that Campbell's statements were published on the date of the interview, and that the statute of limitations began running on that date. The Court of Appeals reversed. It held that an issue of fact exists whether the republication of the allegedly defamatory statements in the February 25, 2000 broadcast was the natural and probable result of the original publication during the interview. If the republication of Campbell's statements was the natural and probable result of the interview, said the appellate court, the statute of limitations did not run until a year after the statements were republished. Campbell seeks leave to appeal to the Supreme Court.

Thursday, April 14, 2005

Morning Session Only

GHAFFARI v TURNER CONSTRUCTION COMPANY, et al. (case nos. 124786-7)

Attorney for plaintiff Louis Ghaffari: Marshall Lasser/(248) 647-7722

Attorney for defendant Turner Construction Company: Donald R. Dillon, Jr./(248) 646-5100

Attorney for defendant Hoyt, Brum & Link: Julie Nichols/(248) 649-7800

Attorneys for amicus curiae Michigan Defense Trial Counsel: Mary Massaron Ross, Kristen M. Tolan/(313) 983-4801

Trial court: Wayne County Circuit Court

At issue: Were the pipes that the plaintiff tripped over "open and obvious"? Should the open and obvious doctrine have any application in a claim under the common work area doctrine described in *Ormsby v Capital Welding, Inc*, 471 Mich 45 (2004)? If so, how should the open and obvious doctrine be reconciled with *Hardy v Monsanto-Chem Systems, Inc*, 414 Mich 29 (1992), in which the Supreme Court concluded that the policy of promoting safety in the

workplace would be enhanced by the application of principles of comparative negligence?

Background: This case arises out of a slip and fall accident that occurred during construction of an IMAX theater at the Henry Ford Museum in Dearborn. The premises were owned and operated by Edison Institute. The defendants include Turner Construction, which was the construction manager, and also two companies hired to do the plumbing and pipefitting work. Louis Ghaffari was employed by Conti Electric, which had been hired to wire the new theater. On August 3, 1999, Ghaffari slipped and fell on copper pipes that were lying on the ground in an area of the construction site that was being used as a walkway. Ghaffari sued, claiming that the pipes posed a hazard to those working on the construction site because they could not be seen easily. Ghaffari alleged that whichever company left the pipes on the floor did so in violation of Michigan law and specific Occupational Health and Safety Administration (OSHA) regulations. Ghaffari further alleged that Turner, as construction manager of the project, violated common law, contractual, and OSHA duties requiring the construction manager to clean up walkways and storage areas, remove trip and slip hazards, and compel trades contractors to remove safety hazards. All the defendants filed a motion to be dismissed from the lawsuit, arguing that the pipes were “open and obvious” and that the defendants had no duty to remove them. The trial court agreed and granted the defendants’ motion for summary disposition. The Court of Appeals affirmed the trial court’s ruling. Ghaffari appeals.

MICHIGAN DEPARTMENT OF CIVIL RIGHTS v FASHION BUG OF DETROIT, INC.
(case no. 126254)

Attorney for claimant Michigan Department of Civil Rights ex rel Burnette Burnside:

Thomas E. Marshall/(248) 829-3360

Attorney for respondent Fashion Bug of Detroit, Inc.: Paul C. Smith/(313) 965-8300

Trial court/lower tribunal: Wayne County Circuit Court and Michigan Civil Rights Commission

At issue: The claimant, who worked at a clothing retailer, was fired for violating a policy that requires employees who return store merchandise to produce a receipt establishing the purchase price. She argues that she was similarly situated to a store manager who refused to allow a customer to return merchandise without a receipt, but was not fired. Did the claimant establish a prima facie case of discrimination?

Background: Burnette Burnside worked as a sales associate at Fashion Bug’s Detroit store. Fashion Bug had a policy that employees who return merchandise must produce a receipt establishing the purchase price. One day Burnside visited the store with her sister and attempted, without success, to return some clothing that she had purchased using her employee discount. Fashion Bug ultimately fired Burnside for violating the store’s employee return policy. Burnside accused the store manager who refused to allow Burnside to return the clothing of making a racially offensive remark. She also asserted that the manager, on a later occasion, refused to allow Burnside’s sister to return clothing without a receipt. The manager responded that Burnside was trying to circumvent the store’s return policy by giving clothing that she had purchased with her discount to her sister to return, because her sister, as a non-employee customer, could return it without a receipt. After her termination, Burnside filed a complaint with the Michigan Civil Rights Commission asserting that she was fired because of her earlier confrontation with the store manager and that the confrontation occurred because of Burnside’s race. She claimed that she was similarly situated to the store manager, who was not fired despite refusing to allow a customer to return clothing without a receipt. The hearing officer who heard

the testimony concluded that Burnside failed to state a prima facie case under Michigan's Civil Rights Act. The Michigan Civil Rights Commission, however, concluded that Burnside made a prima facie claim of race discrimination under the burden-shifting analysis of *McDonnell Douglas v Green*, 411 US 792 (1973). Both the Wayne County Circuit Court and the Court of Appeals affirmed the commission's decision. Fashion Bug seeks leave to appeal to the Supreme Court.

TATE v BOTSFORD GENERAL HOSPITAL (case no. 126603)

Attorney for plaintiff Donald E. Tate: William E. Matz/(248) 476-2830

Attorney for defendant Botsford General Hospital: Linda M. Garbarino/(313) 964-6300

Trial court: Oakland County Circuit Court

At issue: The plaintiff claims that the defendant hospital falsely imprisoned him when its emergency department staff physically restrained him in response to his request to leave and go to another hospital. The Court of Appeals held that if the plaintiff was competent, he had a right to refuse treatment, but that there was a question of fact as to whether the plaintiff was competent. Is there a factual issue as to whether the plaintiff was competent?

Background: On January 18, 2001, Donald Tate experienced an upset stomach and nausea. He drove to Botsford Hospital, where he was admitted to the emergency department. With Tate's consent, and under the direction of Dr. Diane Paratore, a board-certified emergency medicine physician, an attendant took Tate's blood pressure and a blood sample and inserted an intravenous IV in his arm. At this point, Tate decided that the doctor "did not know what she was doing," and said that he wanted to leave Botsford and go to Beaumont Hospital. Paratore told him that he was not well enough to leave. When he tried to get up, the doctor called a security guard, who restrained Tate with wrist restraints. Tate claims that he was treated at the hospital for more than 36 hours without his consent and was prevented from leaving. He alleges in his lawsuit that the hospital's actions falsely imprisoned him there. The hospital asserts that Tate was experiencing a rare but recognized reaction to the drug Compazine, which was given to treat Tate's nausea. Because of this life-threatening reaction, Tate required immediate care and treatment and was not, the hospital claimed, competent to consent to or refuse treatment. The trial court agreed, and dismissed the lawsuit against the hospital. The Court of Appeals reversed, holding that if plaintiff was competent, he had a right to refuse treatment. The appellate court found that there was an insufficient record regarding the information Tate was given at the hospital and that there was a question of fact as to whether he was competent to refuse treatment. The hospital seeks leave to appeal to the Supreme Court.

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